(5)

No. 99-651

IN THE

Supreme Court of the United States

KIM D. FIORIGLIO,

Petitioner,

v.

CITY OF ATLANTIC CITY, JAMES WHELAN, PAUL GALLAGHER, BENJAMIN BRENNER, TERRENCE MOONEY, DENNIS BROOKS, ATLANTIC CITY FIREFIGHTERS LOCAL 198, JOSEPH RUSH, JOHN DOE(S) 1-50, fictitious names(s) as individuals, and ABC CORPORATION(S) 1-50, fictitious names(s) as corporations and/or entities, i/j/s/a,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT PAUL GALLAGHER

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	iii
Statement of the Case	1
Reasons for Denying the Writ	5
I. The District Court Properly Granted Summary Judgment Because There Were No Facts To Suggest Any First Amendment Violation.	5
A. Summary Judgment Was Properly Granted Because There Was No Genuine Issue of Material Fact and Defendants Were Entitled to Judgment as a Matter of Law.	5
B. Petitioner Has No Evidence to Support His Claim of Conspiracy.	9
C. Summary Judgment Was Proper Because There Was No Evidence of a Violation of Freedom of Speech.	13
II. The District Court Properly Granted Summary Judgment Because There Were No Facts To Suggest Any Political Discrimination And Petitioner Could Not Meet His Burden Of Proof.	14

Contents

Page

A. Petitioner Could Not Meet his Burden of Proof. 14

B. Petitioner Does Not Have Standing to Challenge the Burden Shifting Mechanism Utilized by the Third Circuit in Political Discrimination Cases. .. 16

Conclusion 17

TABLE OF CITED AUTHORITIES

Page

Cases:

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 10, 12

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 6

Broadrick v. Oklahoma, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973) 16

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 6

Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3d Cir.), *cert. dismissed*, 483 U.S. 1052 (1987) ... 5

Connick v. Myers, 461 U.S. 139 (1983) 13

Cty. Ct. of Ulster Cty v. Allen, 442 U.S. 140, 99 S. Ct. 2213 (1979) 16

Desvi, Inc. v. Continental Ins. Co., 968 F.2d 307 (3d Cir. 1992) 5

Dombrowski v. Pfister, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965) 16

Freedman v. City of Allentown, PA, 853 F.2d 1111 (3d Cir. 1988) 10

Cited Authorities

	Page
Johnson v. Horn, 150 F.3d 276 (3d Cir. 1998)	5
Leon v. Murphy, 988 F.2d 303 (2d Cir. 1993)	10
Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)	13
Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685 (3d Cir. 1993)	10
Pickering v. Board of Educ., 391 U.S. 563 (1968)	13
Riley v. Jeffes, 777 F.2d 143 (3d Cir. 1985)	10
Robertson v. Fiore, 62 F.3d 596 (3d Cir 1995)	14, 15
Sabo v. Metropolitan Life Ins. Co., 137 F.3d 185 (3d Cir. 1998)	5
San Fillippo v. U.S. Trustco, 737 F.2d 246 (2d Cir. 1984)	10
Scotto v. Almenas, 143 F.3d 105 (2d Cir. May 5, 1998)	10, 13
Stephens v. Kerrigan, 122 F.3d 171 (3d Cir. 1997)	11, 12, 14
Trap Rock Industries, Inc. v. Local 825, Int'l Union of Operating Eng'rs, AFL-CIO, 982 F.2d 884 (3d Cir. 1992)	5

Cited Authorities

Page

Statutes:

42 U.S.C. § 1983 ..... 9, 10

N.J.A.C. 4A:4-4.8 ..... 2, 3

N.J.A.C. 4A:4-4.8(b) 2, 3

N.J.A.C. 4A:4-4.8(b)(4) 2, 3, 4, 12

Rules:

Federal Rule of Civil Procedure 56(c) 5

Federal Rule of Civil Procedure 56(e) 7

Federal Rule of Civil Procedure 60(b) 4, 7

United States Constitution:

First Amendment 1, 5, 9, 16

STATEMENT OF THE CASE

Petitioner seeks review of the Third Circuit's opinion affirming the District Court of New Jersey's May 6, 1997 Decision granting Summary Judgment to Defendants dismissing Counts II and V, alleging causes of action for Defamation and Violation of the New Jersey Law Against Discrimination (NJLAD) and the District Court of New Jersey's March 5, 1998 Decision granting Summary Judgment to Respondents and dismissing all of Plaintiff's remaining claims, Count I, Conspiracy to Deprive Plaintiff of Promotion/Political Retaliation, Count III, Tortious Interference with Plaintiff's Business Activities, Count IV, Violation of Plaintiff's Right to Free Speech and Expression and Count VI, Violation of Conscientious Employee Protection Act.

As detailed below, there is no cause for this Court's review, as the District Court has clearly stated the standard of proof used in concluding Petitioner failed to make specific allegation of a conspiracy and was not deprived of his First Amendment Rights. This Petition is merely a challenge to the District Court's factual findings, as affirmed by the Third Circuit, that Petitioner had no admissible evidence to suggest political retaliation.

The Petitioner, Kim D. Fioriglio, is employed as a Fire Captain in the Atlantic City Fire Department. On November 20, 1992, the New Jersey Department of Personnel (NJDOP) posted the results of its civil service examination for the position of Battalion Fire Chief. These results ranked Petitioner in a four way tie with Daniel Tamburella, and former co-defendants Dennis Brooks and Terrence Mooney. On April 26, 1993 due to his veteran status preference,

co-defendant Dennis Brooks was promoted to Battalion Chief, leaving a three way tie among Petitioner and the former Defendants Mooney and Tamburrella.

In March 1994, Petitioner publicly announced his candidacy for the office of Mayor of Atlantic City. Thereafter, Mayor James Whelan was re-elected to a second term as Mayor of Atlantic City on May 12, 1994. Mayor Whelan received over 5,000 (five thousand) votes and Petitioner received under 200 (two hundred) votes.

On or about October 14, 1994, the NJDOP sent out an advisory letter alerting all Appointing Authorities of the existence of new guidelines, in the form of revised N.J.A.C. 4A:4-4.8(b), regulating the promotional tie breaking procedures within civil service communities. Adopted on September, 7, 1994, revised N.J.A.C. 4A:4-4.8(b)(4), required that an objective statement of reasons for promotion of a particular candidate be prepared and filed with the NJDOP. N.J.A.C. 4A:4-4.8(b)(4) did not set forth any specific criteria to be used in the promotion process, leaving those issues to the discretion of the Appointing Authority. In the City of Atlantic City, the Appointing Authority is the Mayor, James Whelan.

Prior to the adoption of revised N.J.A.C. 4A:4-4.8, the civil service promotional tie-breaking procedure utilized in Atlantic City first considered city residency and second, raw score as a basis for breaking ties for civil service promotions.

The within Respondent, Paul J. Gallagher, was employed by the City of Atlantic City as the City Solicitor from December of 1990 through April of 1995. In that capacity, the October 14, 1994, Civil Service Advisory was brought

to the attention of Respondent Gallagher, who was then obligated to advise the Appointing Authority of this change in the law and its manner of compliance. In response to the amendment to N.J.A.C. 4A:4-4.8(b), and the necessity to clarify the new promotional guidelines, Respondent Gallagher, in his capacity as City Solicitor, drafted Executive Order Number 3 of 1994 after receiving direction as to its contents from the Mayor. Executive Order No. 3 was executed by Mayor Whelan and filed with the Atlantic City City Clerk on December 5, 1994. The new criteria cited in Executive Order No. 3 arose out of policy decisions made by the Mayor and Department Chief, Respondent Benjamin Brenner, regarding the use or non-use of residency, as opposed to other considerations as the tie-breaking determinant. Ultimately the tie-breaking determinants, without regard to hierarchy, were established to be:

1) Disciplinary history;

2) Education;

3) Sick leave abuse;

4) Diversity;

5) Residency; and

6) Raw Score

Following the adoption of Executive Order No. 3, former co-defendants Mooney and Tamburella were promoted to the position of Battalion Chief, which promotions were made pursuant to the profiles of Executive Order No. 3 and N.J.A.C. 4A:4-4.8. In further compliance with N.J.A.C.

4A:4-4.8(b)(4), by letter to the NJDOP dated December 19, 1994, Respondent Chief Brenner articulated the reasons for former co-defendant Mooney's and Tamburella's appointments to Battalion Chief. Respondent Gallagher played no role in the promotion process, the selection of Mooney and Tamburella for promotion or the drafting of Respondent Chief Brenner's letter of December 19, 1994 to the NJDOP.

On May 9, 1996, Petitioner filed the within action in the United States District Court for the District of New Jersey alleging that Respondents conspired against him and denied him a promotion to Battalion Chief in retaliation for his mayoral campaign against Mayor Whelan.

On May 6, 1997 the District Court granted partial Summary Judgment to Respondents and on March 5, 1998 the District Court granted Summary Judgment dismissing all of Petitioner's remaining claims. On April 4, 1998 the District Court denied Petitioner's Motion for Relief under Rule 60(b). On June 8, 1999, the Third Circuit affirmed the District Court's Decisions without opinion. The Petitioner filed a Petition for Rehearing *en banc* to the Third Circuit, which was denied by Order dated July 8, 1999.

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THERE WERE NO FACTS TO SUGGEST ANY FIRST AMENDMENT VIOLATION.

A. Summary Judgment Was Properly Granted Because There Was No Genuine Issue of Material Fact and Defendants Were Entitled to Judgment as a Matter of Law.

Appellate review of a district court's decision to grant summary judgment is plenary. *Johnson v. Horn*, 150 F.3d 276, 281 (3d Cir. 1998) (citing *Sabo v. Metropolitan Life Ins. Co.*, 137 F.3d 185, 195 (3d Cir. 1998)). The Third Circuit was bound to apply the same summary judgment test as applied by the District Court. *Trap Rock Industries, Inc. v. Local 825, Int'l Union of Operating Eng'rs, AFL-CIO*, 982 F.2d 884 (3d Cir. 1992), citing *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.), *cert. dismissed*, 483 U.S. 1052 (1987). Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, the district court must grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Desvi, Inc. v. Continental Ins. Co.*, 968 F.2d 307, 308 (3d Cir. 1992). Rule 56(c) of the Federal Rules of Civil Procedure directs that summary judgment shall be granted:

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

> genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The Supreme Court has held that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986), this Court has further opined:

> [A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial . . . [T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

Id. at 247-250. This standard is further clarified in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986), wherein the Supreme Court held:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential

> element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of [his] case with respect to which [he] has the burden of proof.

In the instant case, Petitioner's unsubstantiated speculation was insufficient evidence to defeat Respondents' motions for summary judgment. In support of his claims, Petitioner continues to rely on the unsworn, unsigned certifications and other inadmissable evidence. Although this Petition refers to how "the Petitioner demonstrated the continuous comments the City officials made against him and how they changed local rules in order to prevent him from being promoted to Fire Battalion Chief," and "evidence to demonstrate remarks the Mayor and other city officials made during the hiring process," no such evidence exists. (Pet. 5-6). Petitioner continues to rely on the unsworn statements despite the District Court's March 5, 1998 decision that these statements fail to meet the requirements of Fed. R. Civ. P. 56(e) and the court would not consider these statements, the District Court's April 8, 1998 decision that these statements did not warrant relief under Rule 60(b), and the District Court's August 13, 1998 decision to deny expansion of the record to include these statements. Time and time again, the District Court referred to Petitioner's lack of evidence:

> . . . plaintiff admits he has no personal knowledge about what the defendants talked during the

> alleged meeting at which Executive Order Number 3 was formulated. He has absolutely no evidence suggesting that defendants set out to retaliate against him for exercising his First Amendment rights. Nor can he point to any other evidence which demonstrates that defendants intentionally created new criteria that would adversely affect his changes of being promoted. (Pet. 15a)

As to Respondent Gallagher, the District Court held:

> Gallagher's actions in carrying out his duties as City Solicitor by drafting a policy at the direction of the Mayor, in compliance with N.J.A.C. 4A:4-4.8, cannot constitute a violation of §1983 without any evidence that the drafting was done with the purpose of retaliating against plaintiff.
>
> Plaintiff also is unable to point to any evidence suggesting that he was treated in a negative manner by any of the defendants either during or after this campaign. In fact, as to defendant Gallagher, he admits that he does not know him personally and would not know him if plaintiff were to see him. (Pet. 21a)

The within Petition essentially challenges the lower court's factual finding, as the District Court made it very clear that the Petitioner did not meet his burden of proof:

> Plaintiff simply cannot maintain a claim of civil conspiracy in violation of §1983 on the unsubstantiated theory that defendants conspired against him in the process of formulating the new

> promotional criteria. He has presented this Court with no proof of improper conduct by the Defendants upon which a jury could base a finding in his favor . . . plaintiff also has not shown how Gallagher's role in bringing the City into compliance with N.J.A.C. 4A:4-4.8 violates his First Amendment rights. (Pet. 24a)

The District Court further held:

> . . . plaintiff has no evidence that any action was taken against him as a result of his protected speech. Plaintiff has nothing but speculation and conjecture linking his speech during the campaign to his failure to be promoted and therefore his state constitutional claim, like his §1983 claim must fail. (Pet. 25a)

B. Petitioner Has No Evidence to Support His Claim of Conspiracy.

Petitioner has alleged a conspiracy in violation of 42 U.S.C. § 1983, specifically that Respondents conspired to deprive him of his First Amendment right to freedom of speech. 42 U.S.C. § 1983 provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

> Constitution and Laws, shall be liable to the party injured in an action at law, suit and equity, or other proper proceeding for redress.

To prove a claim under § 1983, Petitioner must allege conduct which deprives him of a right or privilege secured by the Constitution or laws of the United States. *Freedman v. City of Allentown, PA*, 853 F.2d 1111, 1114 (3d Cir. 1988). *See Riley v. Jeffes*, 777 F.2d 143, 145 (3d Cir. 1985). To prove a § 1983 conspiracy, Petitioner must show that two or more of the Respondents reached an agreement to deprive him of a constitutional right "under color of law." *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 699-700 (3d Cir. 1993) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970). Petitioner must demonstrate the possibility that certain facts exist in which a jury could "infer from the circumstances" that the defendants had a "meeting of the minds" and "reached an understanding" to further the conspiracy. *Adickes* at 158. Evidence that the Respondents "met and otherwise communicated on several occasions" wherein "nothing suspicious or improper in such meetings, which are routine and necessary," without more, does not support a conspiracy theory. *Scotto v. Almenas*, 143 F.3d 105, 114-115 (2d Cir. May 5, 1998) (citing *San Fillippo v. U.S. Trustco*, 737 F.2d 246, 256 (2d Cir. 1984). The mere allegation that such a meeting occurred will not be sufficient "to create a material issue of fact as to whether something improper took place during them." *Scotto* at 115. Where, as in Petitioner's case, the Petitioner only alleges that conspiracy occurred based on the Petitioner's "information and belief," the Respondents are entitled to summary judgment as a matter of law. *Leon v. Murphy*, 988 F.2d 303, 310 (2d Cir. 1993).

Similar to the case of *Stephens v. Kerrigan*, 122 F.3d 171, 173 (3d Cir. 1997), where plaintiff police officers sued the city, mayor and president of the fraternal order of police, claiming they were denied promotions for openly opposing or failing to support the mayor's candidacy, this Court must again focus on "whether [plaintiff] adduced sufficient evidence to permit the fact finder to draw the inference that the employment action was motivated by an impermissible consideration." In *Stephens*, plaintiff Stephens declined to endorse the mayor and testified that he was a vocal supporter of the mayor's opponent within the police department and among neighbors and friends. *Id.* at 173. In a more compelling fact pattern for the plaintiffs than in the instant case, plaintiff Stephens was already Police Chief and ranked first for investigative lieutenant and first for patrol lieutenant at the time when, immediately following the election, defendant Mayor Heydt informed Stephens he would not be rehired as Police Chief. *Id.* at 174. Somewhat similar to the facts of the instant case regarding the October 14, 1994 Alert Letter from the NJDOP, defendant Heydt argued that the failure to promote the defendants was primarily due to the fact that an unfair labor practice complaint before the Pennsylvania Labor Relations Board had been filed as to the very promotion list Plaintiff Stephens sought to enforce. *Id.* at 180. In affirming the district court's grant of summary judgment as to certain plaintiffs, the Third Circuit held

> Even if [the mayor's] reluctance to promote was colored by his view that [plaintiffs] had been in an opposite political camp during the election, we believe that a reasonable jury could not have attributed their lack of promotion to that basis -

> when the [promotions] lists, which had been under attack, were thereafter invalidated.

Id.

Although the promotion list in this case was never invalidated, Defendants Mayor Whelan and Brenner had to consider the directive from the State when considering promotions. Unlike the *Stephens* situation where no one was promoted, the two other candidates tied for first place were promoted and the reasons for their promotion were detailed in compliance with N.J.A.C. 4A:4-4.8(b)(4) by Respondent Brenner. Executive Order Number 3 was drafted in reaction to the State Department of Personnel's revision of N.J.A.C. 4A:4-4.8(b)(4), in an effort to comply with state regulations and not in any way related to Petitioner or his inconsequential mayoral candidacy. There is no direct nor circumstantial evidence that the Respondents had any agreement or "meeting of the minds" to commit any unlawful act, and hence no evidence that would suggest any conspiracy occurred. *Adickes* at 158.

Petitioner has failed to raise any issue of material fact linking Respondent Gallagher's drafting of Executive Order Number 3 of 1994 to retaliation for Petitioner's mayoral campaign in which Petitioner received less than 200 votes.

After three years of litigation, Petitioner failed to establish how his less than 200 votes, in comparison to Mayor Whelan's 5,000 votes rendered him a possible spoiler. If anything, those numbers only reinforce the position Respondents have consistently maintained throughout this case, namely that Kim Fioriglio's candidacy did not affect the 1994 mayoral election nor the subsequent promotions of highly qualified firefighters Mooney and Tamburella.

Petitioner has failed to raise any issue suggesting Respondent Gallagher was involved in any type of conspiracy. With only "unsubstantiated speculation" to support his conspiracy theory, summary judgment was clearly warranted. *See Scotto* at 115. There are no facts to suggest that the Respondents were acting in concert to deprive Petitioner of any constitutional or federally protected right. The facts that do exist suggest the City needed to comply with and respond to a newly enacted state regulation. Respondent Gallagher's activity was limited to ensuring the City's compliance with that regulation and that activity had nothing to do with Kim Fioriglio.

C. Summary Judgment Was Proper Because There Was No Evidence of a Violation of Freedom of Speech.

Petitioner has alleged that Respondents violated his rights to free speech and expression. Under New Jersey Law, in order to succeed on this claim, Petitioner must show that he engaged in protected speech and that speech was a substantial motivating factor in an adverse employment decision. *See Connick v. Myers*, 461 U.S. 139, 142 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). Petitioner has no evidence that any action was taken against him as a result of his protected speech. As the District Court found that Petitioner has nothing but speculation and conjecture linking his campaign speech to his failure to be promoted, the District Court properly granted Summary Judgment on Respondents' Motions for Summary Judgment as to Petitioner's state constitutional claim.

II.

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THERE WERE NO FACTS TO SUGGEST ANY POLITICAL DISCRIMINATION AND PETITIONER COULD NOT MEET HIS BURDEN OF PROOF.

A. Petitioner Could Not Meet his Burden of Proof.

As stated by the Third Circuit in *Stephens*, discussed *supra*, it is well established that:

> To make out a prima facia case, public employees who claim that they suffered from an adverse employment action based on their exercise of a constitutional right must show:
>
> 1. He/she worked for a public agency in a position that does not require a political affiliation.
>
> 2. He/she was engaged in constitutionally protected conduct;
>
> 3. The conduct was a substantial or motivating factor in the government's employment decision.

Id. at 176 (citing *Robertson v. Fiore*, 62 F.3d 596, 599 (3d Cir 1995)). Before any burden would have shifted to Respondents, Petitioner would have had to show that his mayoral campaign was a "substantial motivating factor" in the promotions of highly qualified firefighters Mooney and

Tamburella. *Id.* Despite Petitioner's representation that he "submitted the evidence of political discrimination from the onset," and that he "met his burden of proof," the District Court concluded otherwise and ended its inquiry prior to shifting the burden to Respondents. (Pet. 8). Not only was Petitioner's campaign not "a substantial motivating factor," but the District Court found that Petitioner had "no evidence that any action was taken against him" as a result of his campaign.

The Third Circuit has held that once an employee makes the demonstration of the first three prongs of the test, "the employer may avoid a finding of liability by proving by a preponderance of the evidence that the same employment action would have been taken even in the absence of the protected activity." *Id.* (other citations omitted). A prima facie case must be established before the fourth prong, or burden shifting mechanism, is ever reached. Petitioner's argument that the test employed by the Third Circuit "makes it easier for the defendant to escape liability," not only misrepresents the state of the law, but incorrectly applies the facts of the within case to well established case law. (Pet. 7).

Absent any demonstration, let alone a prima facie case, the District Court was able to end its inquiry and dismiss Petitioner's claim. Contrary to Petitioner's claim that "[t]he lower courts are unsure how to weigh evidence of political discrimination cases versus other employment discrimination cases," the District Court in the instant case had no evidence in support of Plaintiff's claim upon which to weigh. (Pet. 8). Absent any scintilla of evidence to support his claims, Petitioner would have this Court believe that the Third Circuit uses an improper burden shifting mechanism

in political discrimination cases. The facts of the within case do not warrant such an analysis.

B. Petitioner Does Not Have Standing to Challenge the Burden Shifting Mechanism Utilized by the Third Circuit in Political Discrimination Cases.

Petitioner is asking the Supreme Court to review the constitutionality of the burden shifting mechanism utilized by the Third Circuit in political discrimination cases where this Petitioner has no evidence of political discrimination. The argument raised by Petitioner stands contrary to the long adhered general principle that one does not have standing to argue the constitutionality of a law applied to third parties in hypothetical situations. *Cty. Ct. of Ulster Cty v. Allen*, 442 U.S. 140, 154, 99 S. Ct. 2213, 2223 (1979). Unlike the First Amendment cases where this Court carved out a limited exception to the general rule regarding standing, Petitioner is not challenging an overly broad statute which may or may not restrict his First Amendment rights. *See Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S. Ct. 2908, 2914, 37 L. Ed. 2d 830 (1973); *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S. Ct. 1116, 1121, 14 L. Ed. 2d 22 (1965).

Petitioner has blatantly misrepresented the factual findings of the District Court by arguing that he has "submitted substantial evidence," and that he "was more qualified for the position" of Battalion Chief. (Pet. 8). The record below confirms the exact opposite is what occurred. Petitioner's misrepresentation of the factual record below does not call for this Court's review.

CONCLUSION

For all the foregoing reasons, it is respectfully requested that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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